

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
SOL FELDMAN AND LILLIAN FELDMAN	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Personal Income Tax under Chapter 46,	:	
Title T of the Administrative Code of the City	:	
of New York for the Years 1981 through 1983.	:	

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Petitioners, Sol Feldman and Lillian Feldman, Cornwall East 2082, Boca Raton, Florida 33434, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1981 through 1983 (File No. 802955).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 22, 1987 at 10:45 A.M., with all briefs to be submitted by November 6, 1987. Petitioners appeared by Sherman, Feigen & Slivka (William Slivka, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether, for the years at issue, petitioners were taxable as full-year resident individuals of the State of New York as defined in section 605 of the Tax Law.

FINDINGS OF FACT

1. Based upon information received by the Audit Division to the effect that petitioner Sol Feldman had, for the years at issue, received income from a professional service corporation located in New York and had, for the years 1981 and 1983 (no return had been filed for 1982), filed nonresident income tax returns, an income tax field audit was commenced in January 1985.

On February 8, 1985, petitioners executed a consent agreeing that personal income taxes for the year 1981 could be assessed at any time on or before April 15, 1986.

2. On November 20, 1985, the Audit Division issued to petitioners a Statement of Personal Income Tax Audit Changes for each of the years 1981, 1982 and 1983, on which petitioners' New York State and City of New York personal income tax liabilities were recomputed based upon the Audit Division's determination that, for the years at issue, petitioners were taxable as full-year resident individuals.

3. On January 29, 1986, the Audit Division issued notices of deficiency to petitioners as follows:

	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>	
1981	\$1,019.00	\$ 51.00	\$ 481.09	\$1,551.09	
1981	694.00	35.00	327.11	1,056.11	
1982	4,273.00	1,858.73	1,326.85	7,458.58	
1982	442.00	191.42	136.83	770.25	
1983	764.00	38.00	151.13	953.13	
1983	<u>445.00</u>	<u>23.00</u>	<u>87.98</u>	<u>555.98</u>	
	\$7,637.00	\$2,197.15	\$2,510.99	\$12,345.14	TOTALS <sup>1</sup>

4. For each of the years 1981 and 1983, petitioners timely filed a Form IT-203, New York State Nonresident Income Tax Return. Petitioners did not file their 1982 New York State Nonresident Income Tax Return until March 1985. Enclosed with the return was a check dated March 23, 1985 in the amount of \$1,684.73 representing \$1,504.22 total tax due and \$180.51 interest. The amount of \$1,684.73 should, therefore, be credited against the amounts asserted by the Audit Division to be due from petitioners in the notices of deficiency issued for said year.

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<sup>1</sup>It should be noted that, while the notices of deficiency were issued to both petitioners, the notices asserting the greater amounts due for each year represented the deficiencies of Sol Feldman and the lesser amounts represented the deficiencies of Lillian Feldman.

5. For many years prior to the years at issue, petitioners resided in a two-family house located at 5807 18th Avenue, Brooklyn, New York. Petitioner Sol Feldman conducted the practice of osteopathic medicine in offices located on the first floor of his Brooklyn home. Petitioners lived on the second floor. For the years immediately prior to the audit period, petitioners' daughter, Barbara Fabricant, and her two children also resided with petitioners. In the latter part of 1978 or the early part of 1979, petitioner Sol Feldman decided to cut back his medical practice and, due to the failing health of both and at the urging of Lillian Feldman's family who resided in Florida, petitioners rented an apartment in Deerfield Beach, Florida for a period of six months to determine whether or not they wanted to establish a residence there. In November 1979, petitioners purchased a condominium from Century Village in Boca Raton, Florida. Throughout the audit period, however, petitioners continued to own the two-family house in Brooklyn. Petitioner Sol Feldman stated at the hearing held herein that he never thought of selling the two-family house in Brooklyn.

6. On January 23, 1980, petitioner Sol Feldman executed a Declaration of Domicile which was filed with the Clerk of the Circuit Court of Palm Beach County, Florida. On said Declaration of Domicile, Sol Feldman stated that he became a bona fide resident of the State of Florida on November 19, 1979. On January 22, 1980, Sol Feldman registered to vote in Palm Beach County, Florida. At or about the same time, he obtained a Florida driver's license and registered his automobile there. He also joined the Men's Club of Century Village in Florida. Except for a certificate of deposit in a New York bank, petitioners' bank accounts were with Florida banks. They did, however, keep an active checking account with Manufacturer's Hanover Bank in New York for use during their stay in the State.

7. Upon moving to Florida, petitioners gave their apartment on the second floor of the two-family house in Brooklyn to their daughter, Barbara Fabricant, and her children. Petitioners reconditioned a bedroom in the downstairs office for their use whenever they returned to New York.

8. Petitioner Sol Feldman received a letter from the New York State Osteopathic Medical

Society, Inc., dated October 16, 1981, which informed petitioner that, on October 10, 1981, he was granted an inactive membership which does not require payment of dues and is accorded to those who were in active practice in New York but are now retired. For each of the years at issue, however, Sol Feldman received wage income from his professional corporation, Sol Feldman, M.D., P.C.

9. Prior to and during the years at issue, petitioners owned a summer home on Sackett Lake, near Monticello, New York. The home was opened on or about Memorial Day weekend each year and remained in use until approximately mid-September. It was located on a dirt road and, due to its remote location, did not receive town services such as road maintenance and water. The house had no basement and was not insulated. There was baseboard heating in some of the rooms. When petitioners closed the house in mid-September, the electricity was turned off and all water was drained.

10. For each of the years at issue, petitioners left Florida in mid-May and stopped in Marlboro, New Jersey for approximately one week to visit with their daughter, Rhen Cohan. They then drove to Brooklyn to visit with their daughter, Barbara Fabricant, for a couple of days. Following their stay in Brooklyn, petitioners proceeded to their summer home in Sackett Lake where they stayed until mid-September. Approximately once per month, petitioners spent a weekend, from Thursday evening until Monday morning, with their daughter in New Jersey. Petitioners stayed at the office in Brooklyn from mid-September until mid-October at which time they left for Florida, again stopping to visit their daughter in New Jersey.

11. During the years at issue, petitioner Sol Feldman continued to practice osteopathic medicine. While in New York, he came to Brooklyn and opened the office for a couple of days per week, usually arriving from his summer home on Monday and returning to it on Wednesday of each week. A recorded message advised patients to leave a message and that Dr. Feldman would return their call. While in Florida, the recorded telephone message advised patients to contact certain other doctors designated by Dr. Feldman. Most of Dr. Feldman's patients had no-fault insurance, Medicare or Medicaid claims which often required statements and/or testimony

from him.

### CONCLUSIONS OF LAW

A. That Tax Law § 605 former (a), in effect for the years at issue, provided, in pertinent part, as follows:

"Resident individual. A resident individual means an individual:

(1) who is domiciled in this state ... or

(2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

B. That 20 NYCRR 102.2(e)(1) provides, in pertinent part, as follows:

"A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode."

The home on Sackett Lake was suitable for and used only for summer vacations and, as such, was not a permanent place of abode.

C. That, for the years at issue, petitioners did not spend, in the aggregate, more than 183 days of the taxable year in New York State. They arrived in New York in mid-May and departed in mid-October and spent approximately two weeks during this period in New Jersey.

D. That 20 NYCRR 102.2(d) provides, in pertinent part, as follows:

"Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent.

(2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

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(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere."

E. That, while petitioners did purchase a home in Florida, it appears that their sole motivation in doing so was to spend winters there. Both petitioners suffered from ill health and New York winter weather was clearly harmful to their health. However, it also appears that the other affirmative acts, i.e., executing a Declaration of Domicile, registering to vote, obtaining a driver's license, etc., were performed solely to qualify as nonresidents for New York State and City personal income tax purposes. Petitioners retained ownership of their two-family home and, as indicated in Finding of Fact "5", supra, had no intention of selling it. Dr. Feldman continued to practice osteopathic medicine, although on a limited basis. Moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (Matter of Zinn v. Tully, 54 NY2d 713, revg 77 AD 2d 725).

"While so-called 'formal declarations' of domicile such as voter registration or motor vehicle registration have lost their importance in recent years as courts have recognized their self-serving nature, the 'informal declarations' and acts of the person have been given greater recognition in resolving the question of domicile." (Wilke v. Wilke, 73 AD2d 915, 917.)

The actions of petitioners, examined as a whole, do not indicate an intention to make a fixed and permanent home in Florida.

F. That, for each of the years at issue, the Audit Division imposed penalty pursuant to section 685(b) of the Tax Law (section 685[a][1] and [2] penalty was also imposed for 1982). This penalty is imposed if "any part of a deficiency is due to negligence or intentional disregard of this article or rules or regulations hereunder". Petitioners filed nonresident returns believing that they had effected a change of domicile. While it has herein been determined that such change of domicile did not occur, no negligence or intentional disregard by petitioners has been shown and, as such, penalties imposed pursuant to Tax Law § 685(b) must be cancelled. In addition, as indicated in Finding of Fact "4", supra, petitioners must be credited with a payment

of \$1,684.73 (\$1,504.22 tax plus \$180.51 interest) against liabilities asserted to be due for the year 1982.

G. That the petition of Sol Feldman and Lillian Feldman is granted to the extent indicated in Conclusion of Law "F", supra; that the Audit Division is directed to modify the notices of deficiency issued January 29, 1986 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

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ADMINISTRATIVE LAW JUDGE